Supreme Court, U.S.
FILED

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NO. _____,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE STATE OF OKLAHOMA,

Petitioner,

v.

JACKIE EUGENE HUMPHREY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

SUSAN BRIMER LOVING
ATTORNEY GENERAL

SANDRA D. HOWARD*
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

A. DIANE BLALOCK
ASSISTANT ATTORNEY GENERAL

2300 N. Lincoln Blvd., Suite 112
Oklahoma City, Oklahoma 73105-4894
(405) 521-3921

March, 1994
*Counsel of Record

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QUESTION PRESENTED

Whether the Oklahoma appellate court's ruling that the punishment option of life without parole in First Degree Murder cases should be available to those persons who committed the crime before the life without parole option went into effect, but were tried after the effective date, violates federal and state constitutional principles.

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NO. _____,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE STATE OF OKLAHOMA,

Petitioner,

v.

JACKIE EUGENE HUMPHREY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Oklahoma, by and through Susan Brimer Loving, Attorney General of the State of Oklahoma, respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The published opinion of the Oklahoma Court of Criminal Appeals is recorded at Humphrey v. State, 864 P.2d 343 (Okla. Crim. App. 1993).[1]

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

The defendant, Jackie Eugene Humphrey, was convicted of the crime of First Degree Murder in Okmulgee County, Oklahoma, in Case No. HCRF-87-5001. Humphrey stabbed his common law wife, Bessie Phipps, to death on New Years Day in the Cuban Bar in

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[1] The Court of Criminal Appeals did not set forth a complete discussion of this issue in Humphrey but relied on its opinions in Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993) and Salazar v. State, 852 P.2d 729 (Okla. Crim. App. 1993), rehearing denied, 859 P.2d 517 (1993). The State has petitioned for a writ of certiorari in Hain and that matter is currently before this Court in Case No. 93-1252.

Henryetta, Oklahoma. The murder was preceded by threats against Ms. Phipps made in the presense of witnesses.

In 1987 the Oklahoma legislature amended the punishment statute for First Degree Murder, Okla.Stat. tit. 21 § 701.10 (1987), adding a third, middle range, punishment option of life imprisonment without the possibility of parole. The amendment's effective date was November 1, 1987, and contained no language regarding retroactive application.

At the time Humphrey murdered Bessie Phipps, the punishment options for First Degree Murder were life imprisonment or death. By the time the defendant was tried, however, the new amendment had gone into effect adding the third option of life without parole.

In Humphrey's direct appeal, the Court of Criminal Appeals affirmed his conviction for First Degree Murder but reversed the

death sentence imposed by the jury and ordered the case remanded for a new sentencing proceeding, at which time the jury should be given all three sentencing options now available for First Degree Murder, including life without parole.

SUMMARY OF THE ARGUMENT

The Oklahoma appellate court's decision that life without parole is a sentencing option for those persons who committed murder before the effective date of the life without parole amendment violates federal and state constitutional standards of equal protection, and cruel and unusual punishment.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF CRIMINAL APPEALS' DECISION IS CONTRARY TO ITS OWN PRIOR HOLDINGS AND THE HOLDINGS OF OTHER STATE COURTS.

In the opinion below, the Oklahoma Court of Criminal Appeals reversed and remanded

the sentence of death to the district court for resentencing. In doing so, the Court relied on its earlier opinion in Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993) where the Court found that "given the gravity of the death penalty", "principals of fundamental fairness" compelled them to remand for a new second stage trial since the amendment to Okla.Stat.tit. 21 § 701.10 (1987) providing for the option of life without parole was in effect at the time of the trial. Hain, 852 P.2d at 753.

In its decisions on this issue, the Court of Criminal Appeals ignored its own well settled law. Oklahoma has in the past consistently held that the punishment in effect at the time the crime was committed is the punishment to which the perpetrator should be subjected. Other jurisdictions have held similarly. See State v. Hardy, 489 A.2d 508, 512 (Me. 1985); Ruplenas v. Commonwealth, 275 S.E. 2d 628, 632 (Va.

1981); Galbraith v. State, 693 P.2d 880, 882 (Alaska Ct. App. 1985); State v. Zaehringer, 325 N.W.2d 754, 761 (Iowa Ct. App. 1982); State v. Sylva, 795 P.2d 947, 950 (Kan. Ct. App. 1990); State v. Henning, 599 P.2d 318, 329 (Kan. Ct. App. 1979).

In the case of Pollard v. State, 521 P.2d 400 (Okla. Crim. App. 1974) the petitioner had been sentenced to serve ten (10) years for the crime of Grand Larceny, After Former Conviction of a Felony. Mr. Pollard's former felony conviction was Possession of Marihuana, which had been subsequently reclassified by the state legislature as a misdemeanor. In rejecting Mr. Pollard's post conviction relief appeal, this Court stated in its syllabus:

1. **The law in force defining a criminal offense at the time the crime was committed is the law governing the classification of the offense and the punishment that can be imposed therefore,** and this is true notwithstanding the enactment of a statute reclassifying the crime and reducing punishment, prior to the trial of the offender, unless such statute contains

language expressing the intent of the Legislature that the classification and sentence reduction are to be applied retroactively.

and, ultimately held:

[T]he Legislature may make retroactive a statute lessening the punishment and classification of an offense, but the intent to do so must be affirmatively expressed in said statute.

Pollard, 521 P.2d at 401, 402 (emphasis added).

In the 1912 case of Lilly v. State, 7 Okl.Cr. 284, 123 P. 575 (1912) the plaintiff had committed the crime of conjoint robbery in January, 1908. At the time of the crime the punishment prescribed was life imprisonment. However, on March 23, 1909, the Legislature changed the punishment from life imprisonment to a term of five (5) to fifty (50) years imprisonment. The appellate court had ruled that the case had to be sent back for retrial on other grounds, and, having noted that the trial court had improperly

instructed the jury on the punishment range of five (5) to fifty (50) years during the first trial, held:

> [T]hat the district court of Lincoln county, upon a retrial of this case, should submit the punishment for conjoint robbery **under the statute as it existed at the time the offense is alleged to have been committed.**

Lilly, 123 P. at 578 (emphasis added).

In the case of Penn v. State, 13 Okl.Cr. 367, 164 P. 992 (1917) the defendant was under eighteen (18) years old and was charged with statutory rape. The victim was over fourteen (14) years of age. The defendant committed the crime on May 9, 1913. A statute went into effect on May 16, 1913, holding that consensual intercourse under the above facts was not rape. The petitioner contended that he was entitled to the application of the statute which was in effect (the May 16, 1913, statute) at the time of his trial. This Court disagreed, holding:

> **The very minute this crime was committed the defendant became amenable to the law as it then existed.** He then and there by his own voluntary conduct incurred the penalty of that law, and the constitutional provision aforesaid prevents the Legislature of this state from wiping out penalties for crimes committed prior to the taking effect of a repealing statute.
>
> . . .
>
> **We hold, therefore, that this defendant was subject to any penalty imposed by law for this crime on the date of its commission**, and any subsequent statute repealing such penalty can only operate prospectively, and is applicable only to offenses committed after the statute took effect.

Penn, 164 P. at 993 (emphasis added). See also Cooper v. State, 432 P.2d 951 (Okla. Crim. App. 1967).

As recently as 1990 the Court of Criminal Appeals held that:

> It is a well established rule of law that the appropriate criminal penalty is the penalty in effect at the time the defendant commits the crime.

Bowman v. State, 789 P.2d 631 (Okla. Crim. App. 1990).

The decision in this case violates the holdings of all of the Oklahoma cases

discussed above and well as those of other jurisdictions, and should be reviewed by this Honorable Court.

II.

THE COURT OF CRIMINAL APPEALS BASED ITS DECISION ON AN ERRONEOUS APPLICATION OF A "DEATH IS DIFFERENT" STANDARD FOR CAPITAL CASES.

It is a well established rule of law that unless specified otherwise, statutes only have prospective, and not retroactive, application. See e.g. Edwards v. State, 591 P.2d 313, 317 (Okla. Crim. App. 1979); In re Bomgardner, 711 P.2d 92, 95 (Okla. 1985); In re McNeely, 734 P.2d 1294, 1296, n. 7 (Okla. 1987).

The life without parole amendment under § 701.10 did not specify that it was to have retroactive application. The primary reason the Court of Criminal Appeals gave for treating § 701.10 differently is because it dealt with capital cases, citing

this Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 86 L.Ed.2d 231, 239 (1985). Hain, 852 P.2d at 753; Salazar, 852 P.2d at 739.

As the dissent in both Hain and Salazar pointed out:

> While the final nature of the death penalty may result in a more microscopic review of the facts of a case, it does not change basic principle of the application of a rule of law, or the manner of consistently applying the law.

Hain, 852 P.2d at 755.

This Court has recognized that the penalty of death is qualitatively different from a sentence of imprisonment. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). However, this need for heightened

reliability does not translate into an application of different legal standards to capital cases.

In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), this Court articulated the standard for evaluating ambiguous jury instructions. In so doing, this Court stated:

> There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.

This statements is indicative of this Court's policy that while the qualitative different of death from all other punishments requires a greater degree of scrutiny, it does not require that state procedural rules or constitutional provision be ignored.

In Spaziano v. Florida, 468 U.S. 447, 456, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), this Court reaffirmed its commitment to the demands of reliability in decisions involving death but was unwilling to close its eyes to the social of cost of a rule which would require that the jury be instructed on lesser included offenses for which the defendant may not be convicted.

This Court has also refused to apply a different category of rules in recent capital cases involving the enforcement of procedural default rules. Herrera v. Collins, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); Coleman v. Thompson, 501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Smith v. Murray, 477 U.S. 527, 539, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (this Court rejected the concept that when a defendant in a capital case raises a

"substantial, colorable" constitutional claim, a federal court should entertain it no matter how egregious the violation of state procedural rules).

While procedural statutes may be retroactively applied, substantive statutes may not. The Supreme Court of Kansas, in discussing whether a statute enlarging the jurisdiction of the juvenile courts applied to cases then pending on appeal, stated:

> As related to criminal law and procedure, **substantive law is that which declares what acts are crimes and prescribes the punishment therefor;** whereas, procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished. (22 C.J.S. § 1 a; 40 Words and Phrases, Substantive Law, p. 859).

State v. Augustine, 416 P.2d 281 (Kan. 1966) (emphasis added). Likewise, in an Arizona case, the court held that certain changes in that State's rules of evidence were procedural and not substantive, where:

> the crimes for which the defendant was charged, **the punishment to be imposed,** and the quantity of degree of proof necessary

to convict remained the same; only the admissibility of certain evidence was changed.

State v. Steelman, 585 P.2d 1213 (Ariz. Ct. App. 1978) (emphasis added).

Thus, the legislation in this case, in adding a middle, third tier to the possible punishment ranges for First Degree Murder, constituted a change of substantive, and not procedural law. The change did not merely affect the method of enforcing the punishment, but the actual statutory punishment itself. Therefore, absent specific legislative intent, the amendment should not have been applied retroactively. Merely because the case deals with capital punishment does not allow disregard for well settled precedent. The Court of Criminal Appeals seriously misapplied this Court's holding in Caldwell and its progeny by using the "death is different" adage to disregard established precedent. The Court provided no justification for its departure

from prior holdings other than the use of broad, generalized terms such as "fundamental fairness" and "demands of justice" based on the fact that this is a capital case. The Court stated in Hain:

> Quite simply, we cannot justify a decision which would act as a total bar to consideration of a punishment alternative to death merely because the crime giving rise to the trial occurred a short time before the effective date of previously enacted legislation.

Hain, 852 P.2d at 753. This comment is in direct contradiction to well-established law and cannot be justified by relying on the "gravity of the death penalty". The result of the Court's misapplication of this amorphous "death is different" concept is an unconstitutional and contrived mechanism for re-sentencing in certain capital cases and warrants review by this Court.

III.

THE COURT OF CRIMINAL APPEALS DECISION VIOLATES EQUAL PROTECTION BY PROVIDING AN ADDITIONAL SENTENCING OPTION TO PERSONS TRIED AFTER NOVEMBER 1, 1987, WHICH IS NOT AVAILABLE TO SIMILARLY SITUATED PERSONS TRIED BEFORE NOVEMBER 1, 1987.

The Court of Criminal Appeals in its decisions on this issue[2] has impermissibly caused disparate treatment of persons similarly situated. The defendant Humphrey belongs to a class of criminals who committed First Degree Murder prior to November 1, 1987. Because he was tried after that date, however, the Court of Criminal Appeals has ruled that he is entitled to a new sentencing proceeding at which he will receive the benefit of a third sentencing option. Other criminals

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[2] See Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993); Salazar v. State, 852 P.2d 729, **rehearing denied**, 859 P.2d 517 (Okla. Crim. App. 1993); Wade v. State, 825 P.2d 1357 (Okla. Crim. App. 1992); and Allen v. State, 821 P.2d 371 (Okla. Crim. App. 1991).

in the class who were tried before November 1, 1987, are not entitled to the same results. A violation of equal protection occurs when the government treats someone differently than another who is similarly situated. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). The State submits that this disparate treatment violates the Fourteenth Amendment to the United States Constitution.

It is completely conceivable that two murderers (perhaps even accomplices in the same act) who committed their crimes before November 1, 1987, will be treated differently under the Court's holding. If Murderer A vigorously pursued his speedy trial rights and was tried before November 1, 1987, he would be entitled to only two sentencing options upon conviction of First Degree Murder, the options of life imprisonment or death. If Murderer B, on

the other hand, drug his feet, and obtained a number of continuances so that he were tried after November 1, 1987, he would be entitled to three sentencing options upon his conviction for First Degree Murder. The disparate treatment of Murderer A and B cannot withstand constitutional scrutiny.

The Court's holding is also flawed because it does not define at what point the defendant becomes entitled to the life without parole option. Would a trial that began in October, 1987, but in which the sentencing verdict was not rendered until November 1, 1987, come under the terms of the Court's holding, or only those trials in which the proceedings began after November 1, 1987? The Court's decision, in an attempt to provide capital defendants with all possible constitutional entitlement, has created constitutional infirmities where none previously existed.

Since the Court of Criminal Appeals' decision in this case and others, the Oklahoma legislature has attempted to remedy the situation by amending Okla.Stat. tit. 21 O.S. § 701.10(a) (1993) which deals with the procedure to be followed in capital cases which have been remanded. Under the new amendment to § 701.10(a), once a case is remanded for resentencing, the defendant shall not be entitled to the life without parole option if the crime occurred before November 1, 1987.

Thus, another anomaly has been created. If the Court of Criminal Appeals opinions in Allen, Wade, Hain, Salazar, and Humphrey stand, then all cases in which the murder occurred before November 1, 1987, but the trial occurred after November 1, 1987, will be remanded for re-sentencing so that the life without parole option may be considered. Under the Legislature's new amendment to § 701.10(a), however, the life

without parole option may not be given. Oklahoma prosecutors, defense attorneys, and trial judges have been thrust into the situation of deciding whether to abide by the Court of Criminal Appeals' decisions or the legislature's statutory law - both cannot be followed.

As further evidence of the muddied legal precedent that the Court of Criminal Appeals has created, in Wade v. State, 825 P.2d 1357 (Okla. Crim. App. 1992), the Court of Criminal Appeals held that, though the defendant was entitled to the life without parole option, he had to specifically request it at trial and waive his constitutional right against the application of any ex post facto law. Wade, 825 P.2d at 1363. This request and waiver requirement was not followed in the Hain, Salazar and Humphrey cases.

The Court of Criminal Appeals has unconstitutionally differentiated between

similarly situated individuals in an arbitrary and capricious manner with no reasonable basis. It has created legal precedent which is internally inconsistent, illogical, and impossible to follow. This Court should accept this case for review.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to review the decision of the Court of Criminal Appeals.

Respectfully submitted,

SUSAN BRIMER LOVING
ATTORNEY GENERAL OF OKLAHOMA

Sandra D. Howard

SANDRA D. HOWARD, OBA #11873
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

A. DIANE BLALOCK
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR PETITIONER

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

SUSAN BRIMER LOVING
ATTORNEY GENERAL

SANDRA D. HOWARD*
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

A. DIANE BLALOCK
ASSISTANT ATTORNEY GENERAL

2300 N. Lincoln Blvd., Suite 112
Oklahoma City, Oklahoma 73105-4894
(405) 521-3921

March, 1994
*Counsel of Record

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"EXHIBIT A"

JACKIE EUGENE HUMPHREY,	)	
	)	
Appellant,	)	
	)	
-vs-	)	F-88-57
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

COURT OF CRIMINAL APPEALS OF OKLAHOMA

September 27, 1993

As Corrected Oct. 4, 1993.

Rehearing denied December 3, 1993

Defendant was convicted in the District Court, Okmulgee County, Ann Moroney, J., of murder in the first degree and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, Lane, J., held that (1) sentencing court erred by instructing jury as to life imprisonment and death but failing to instruct on punishment of life without parole, and (2) defendant was not entitled to instruction on heat of passion manslaughter.

Judgment affirmed, sentence vacated and remanded.

Lumpkin, P.J., filed opinion concurring in part and dissenting in part.

1. **Homicide 311, 340(1)**

In sentencing defendant convicted of first-degree murder, sentencing court erred in instructing jury on life imprisonment and death, but failing to instruct on punishment of life without parol; such omission rendered sentencing stage fundamentally unfair and required remand for resentencing. 21 Okl.St.Ann. § 701.10.

2. **Homicide 309(3)**

Defendant was not entitled to instruction on heat of passion manslaughter; no evidence was introduced to suggest that defendant acted without design to effect death. 21 Okl.St.Ann. § 711.

An Appeal from the District Court of Okmulgee County; Ann Moroney, District Judge.

Jackie Eugene Humphrey, Appellant, was tried by jury for the crime of Murder in the First Degree in Case No. HCRF-87-5001 in the District Court of Okmulgee County before the Honorable Ann Moroney, District Judge. Appellant was sentenced to Death and has perfected this appeal. Judgment is **AFFIRMED** and Sentence is **VACATED AND REMANDED FOR RESENTENCING.**

James A. Conrady, Okmulgee, at trial Terry J. Hull, Cindy Brown, Asst. Appellate Defenders, Norman, on appeal, for appellant.

Thomas Giulioli, Dist. Attorney., Beryl R. Davis, O.R. Barris, III, Asst. Dist. Attys., Okmulgee, at trial, Robert H. Henry, Atty. Gen., Sandra D. Howard, Asst. Atty. Gen., Oklahoma City, on appeal, for appellee.

OPINION

LANE, JUDGE:

Jackie Eugene Humphrey, appellant, was tried by jury for murder in the first degree (21 O.S.1981, § 701.7) in Okmulgee County District Court, Case No. HCRF-87-5001. The State filed a Bill of Particulars seeking the death penalty. After returning a verdict of guilt, the jury assessed a death sentence.

[1] Life imprisonment and death were the only sentencing options given to the jury. This was error. Under 21 O.S.Supp.1987, § 701.10, which came into effect approximately one month prior to the trial, the jury also should have been instructed on the punishment of "life without parole". This omission renders the sentencing stage fundamentally unfair and requires remand of this case to the District Court for resentencing. Hain v. State, 852 P.2d 744 (Okl.Cr.1993); Salazar

v. State, 852 P.2d 729 (Okl.Cr.1993); 21 O.S.Supp.1985, § 701.13.

Remand for resentencing renders moot all challenges to the second stage of trial.[1] We will address on the merits only Proposition II in which appellant asserts the trial court erred by refusing to instruct the jury on the crime of Heat of Passion Manslaughter.

Appellant stabbed his common law wife, Bessie Phipps, to death on New Years Day in the Cuban Bar in Henryetta, Oklahoma. The common law marriage had been marked with violence apparently precipitated by his drinking and her infidelity. Upon his work release from Jess Dunn Correctional Center

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[1]Second stage challenges include propositions III, IV, V, VI, VII, VIII, IX, X, XI and XII. Proposition I challenges the selection of a death-qualified jury under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968). While this is procedurally a first-stage issue, it challenges the validity of the death sentence imposed and is therefore moot.

December 18, 1986, appellant returned home to discover his wife had taken their household goods and moved in with another man. Sometime on New Years Day, 1987 the appellant called a friend. His wife answered, and when he asked her to come home, she laughed and hung up.

Appellant later came looking for her at the friend's home, and threatened a group there with his folding Buck knife. He was told she was down the road at the Cuban Bar. Appellant took the friend's car and drove there looking for her. He burst through a back door; grabbed her by the hair; held his freshly sharpened Buck knife to her throat; and, as they fell backwards, stabbed her at least four (4) times in the abdomen and chest.

Prior to the attack he told a friend he should, "just slash that god damn bitch to pieces". After the attack he called his estranged wife a "damn whore" and said, "if

she wasn't dead now [he'd] kill her next time". While escorted out of the bar by police he added, "tramp, tramp, tramp, you won't tramp no more". He asked the police officers if they would let him loose so he could "finish the job" if she wasn't dead. Ms. Phipps died in the ambulance on the way to the hospital.

[2] Appellant argues that trial court erred by refusing his requested instruction on Heat of Passion Manslaughter. This argument might be persuasive if evidence to show the appellant was in the heat of passion were enough to warrant this instruction. It is not. To warrant this instruction, evidence must be introduced to support the theory the killing was "perpetrated without a design to effect death". 21 O.S.1981, § 711. No evidence was introduced to suggest the appellant acted without a design to effect death. The instruction was therefore properly

refused. See Brown v. State, 777 P.2d 1355 (Okl.Cr.1989); compare Wood v. State, 486 P.2d 750 (Okl.Cr.1971); see also, Walker v. State, 723 P.2d 273 (Okl.Cr. 1986). In summary, we affirm the conviction and reverse and remand the sentence of death to the District Court for resentencing.

LUMPKIN, P.J., concurs in part/dissents in part.

JOHNSON, V.P.J., and **CHAPEL, J.**, concur.

LUMPKIN, Presiding Judge: concurring in part/dissenting in part.

I concur in the affirmance of the murder conviction but disagree with the decision to reverse and remand for resentencing. As stated in my separate opinions to Hain v. State, 852 P.2d 744, 753 (Okl.Cr.1993), and Salazar v. State, 852 P.2d 729, 741 (Okl.Cr.1993), the appropriate criminal penalty is the penalty in effect at the time the defendant commits the crime.

Therefore, as the sentencing option of life without parole did not come into effect until after Appellant had committed the murder, he is not eligible in this case for the punishment of life without parole.

"EXHIBIT B"

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JACKIE EUGENE HUMPHREY,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	F-88-57
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING PETITION FOR REHEARING

Jackie Eugene Humphrey, petitioner, was convicted of murder in the first degree and sentenced to death in Okmulgee County District Court, Case No. HCRF-87-5001. Judgment was affirmed, and sentence was reversed and remanded for failure to instruct on the sentencing option of life without parole by this Court on September 27, 1993. (Case No. F-88-57). Petitioner is before the Court on a Petition for Rehearing, alleging the Court overlooked facts decisive of the case. Specifically, petitioner argues he presented facts

sufficient at trial to warrant an instruction on Manslaughter in the First Degree, that is heat of passion manslaughter. On direct appeal this Court rejected the argument, finding the trial court properly instructed the jury.

We again reject the argument. Petitioner stabbed his common law wife, Bessie Phipps to death on New Year's Day, 1987 in the Cuban Bar in Henryetta, Oklahoma. Witnesses to the stabbing testified Petitioner called Ms. Phipps a "damned whore" and said if she wasn't dead he'd kill her next time. He also asked police officers called to the scene to turn him loose so he could "finish the job" if she wasn't dead. While the defendant testified in his own behalf he had no intent to kill, he also stated on direct he did not remember the stabbing. On cross-examination he stated he had no memory of what he said during the stabbing, or of the

stabbing itself. Under these circumstances, the trial court did not abuse its discretion in finding insufficient evidence was presented to warrant the first degree manslaughter instruction.

IT IS THEREFORE THE ORDER OF THE COURT that the Petition for Rehearing filed herein be and is hereby denied, and mandate ordered to be issued forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day of December, 1993.

GARY L. LUMPKIN, PRESIDING JUDGE

CHARLES A. JOHNSON, VICE-PRESIDING JUDGE

JAMES F. LANE, JUDGE

CHARLES CHAPEL, JUDGE

RETA M. STRUBHAR, JUDGE

93-1395 (3)

APR 29 PAGE 2

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JACKIE EUGENE HUMPHREYS
Respondent
~~Petitioner~~,

v.

THE STATE OF OKLAHOMA,
Petitioner
~~Respondent~~.

BRIEF IN OPPOSITION TO PETITION OF WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

RANDY A. BAUMAN *
DEPUTY APPELLATE INDIGENT DEFENDER
1660 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73019
(405) 325-3331

WILLIAM H. LUKER
DEPUTY APPELLATE INDIGENT DEFENDER
1660 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73019
(405) 325-3331

CINDY G. BROWN
ASSISTANT APPELLATE INDIGENT DEFENDER
1660 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73019
(405) 325-3331

ATTORNEYS FOR PETITIONER

* Counsel of Record

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STATEMENT OF THE CASE

Respondent, Jackie Eugene Humphrey, was the Appellant in the case below, Humphrey v. State, 864 P.2d 343 (Okla. Crim. App. 1993). Mr. Humphrey was convicted of first degree murder and sentenced to death. On appeal, the Oklahoma Court of Criminal Appeals affirmed the conviction, but vacated the death sentence because the jury in Mr. Humphrey's case had not considered the life without parole sentencing option. This sentencing option was adopted by the Oklahoma Legislature in 1987, and was in effect at the time of Mr. Humphrey's conviction and sentence.

SUMMARY OF ARGUMENT

There is no question of federal law for this Court to review, because the Oklahoma Court of Criminal Appeals made its determination on the applicability of the statute in question to Mr. Humphrey based upon state law considerations. The Oklahoma Court of Criminal Appeals, Oklahoma's highest court of jurisdiction, applied its own developed law concerning the application of changes in procedural law in criminal cases. In addition, the court determined that the plain language of the amendments to Okla. Stat. tit. 21, §§701.9 and 701.10 clearly required application of the statute to all those convicted after the effective date of the legislation. While federal law was discussed to exemplify the gravity of the error in this death penalty case, the state court's decision did not rest upon these federal principles, but instead was based upon an interpretation of Oklahoma law.

Further, Petitioner's concern that the Oklahoma Court of Criminal Appeals decision may hypothetically violate the equal protection rights of an as-yet unnamed (and possibly non-existant) class of persons does not sufficiently present a claim requiring federal review. If a case arises which fits the currently speculative hypothesis of Petitioner, the Oklahoma Court of Criminal Appeals should first be given the opportunity to resolve the question in that case.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER'S REASONS I AND II FAIL TO STATE JURISDICTIONAL ISSUES BECAUSE THE ISSUE OF THE NECESSITY FOR AN INSTRUCTION ON THE SENTENCING OPTION OF LIFE WITHOUT PAROLE WAS DECIDED ON ADEQUATE INDEPENDENT STATE GROUNDS.

The discussion of this issue in the opinion for which the petitioner now seeks a writ of certiorari[1] is extremely brief, and is based upon two prior decisions by the Oklahoma Court of Criminal Appeals -- Hain v. State, 852 P.2d 744 (Okla.Crim.App. 1993); and Salazar v. State, 852 P.2d 729 (Okla. Crim. App. 1993).[2] These cases were themselves the product of two prior holdings -- Allen v. State, 821 P.2d 371, 375-376 (Okla. Crim. App. 1991); and Wade v. State, 825 P.2d 1357, 1363 (Okla. Crim. App. 1992). A review of all of these authorities will reveal that while federal grounds have been considered in the course of this litigation, the decision of the Oklahoma Court of Criminal Appeals now in dispute is based upon state grounds which are adequate to uphold its decision regardless of the outcome of further litigation of any federal issues involved. Accordingly, there are no decisive federal questions for this court to review under 28 U.S.C. § 1257.

A. History of the litigation.

In order to understand the posture of this issue, it is necessary to review its history in the Oklahoma Court of Criminal Appeals. This litigation arises from the Oklahoma

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[1] Humphrey v. State, 864 P.2d 343, 344 (Okla. Crim. App. 1993).

[2] The opinion also mentions 21 O.S. Supp. 1985, § 701.13. Section 701.13, **supra**, sets forth the powers of the Oklahoma Court of Criminal Appeals and appellate procedures to be followed in capital cases. It provides no explicit guidance on the issue at hand.

Legislature's passage of an amendment to its statutes regarding punishment for first degree murder, providing for a life without parole sentencing option. The effective date of the statute was November 1, 1987. The question then arose whether persons convicted after the effective date of the statute were eligible for the life without parole. The Oklahoma Court, first in Allen v. State, 821 P.2d 371 (Okla. Crim. App. 1993) and then Wade v. State, 825 P.2d 1357 (Okla. Crim. App. 1992), decided that defendants convicted after the effective date of the legislation who requested such an sentencing option were entitled to its consideration. The Court next addressed situations, like the one in which Petitioner now seeks certiorari, where the defendant was convicted after the effective date of the statute, but no affirmative request for consideration of the life without parole option was made. In Salazar v. State, 852 P.2d 729 (Okla. Crim. App. 1993), State's petition for rehearing denied, 859 P.2d 517 (Okla. Crim. App. 1993), and Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993), determined that the life without parole sentencing option accrued to all defendants convicted of first degree murder after the effective date of the statute, and the failure of a sentencer to consider this option was fundamental error.[3] The State of Oklahoma now seeks certiorari in Mr. Humphrey's case, which is grounded upon, and does not expand, these prior decisions.

In the court's initial decision on this question, Allen v. State, supra, the court based its opinion to a large extent on its finding that the application of life without parole to crimes

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[3] The Salazar and Hain opinions were handed down on the same date, April 29, 1993. Although the discussion of this issue in the body of the Hain opinion is brief and does not discuss the state law issues, the order denying rehearing in Hain specifically adopted the reasoning of the Salazar decision. Hain, 852 P.2d at 756.

that occurred before its effective date did not violate the federal and state prohibitions against **ex post facto** laws. See Art. I, § 10 of the United States Constitution and Art. 2, § 15 of the Oklahoma Constitution. Id., 821 P.2d at 375-376.[4] The next case, Wade v. State, supra., followed the same reasoning as Allen. In these early cases the defendants had requested consideration of life without parole[5], thus raising the issue at the trial level.

The next case in which the application of life without parole was an issue was Salazar v. State, supra. This was an appeal from a death sentence resulting from a jury trial in which the defense had not requested a life without parole instruction. A favorable ruling from the Oklahoma Court of Criminal Appeals created the potential for the reversal of a substantial number of death sentences in other cases then pending direct review. This potential resulted in the court's reevaluating the entire issue, this time with the focus on state law.

B. Salazar and its progeny, Hain and Humphrey, were decided on the Court's analysis of Oklahoma law and statutory construction

The independent state law grounds upon which the Oklahoma Court of Criminal Appeals resolved this question are: 1) the Court's explicit conclusion that its decisions on the applicability of this state law sentencing option "are consistent with decades of Oklahoma law governing the application of procedural changes in criminal cases," Salazar, 852 P.2d at 737; and 2) "the legislature's clear determination that life without parole should be

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[4] The court also discussed the individualized sentencing requirement of Eighth Amendment to the United States Constitution. 821 P.2d at 376.

[5] Allen and Wade both involved sentencing by the trial courts after guilty pleas rather than jury trials.

considered in sentencing a defendant who has been convicted of First Degree Murder...," as expressed in the enactment of amended Okla. Stat. Supp. 1987, tit. 21, §701.10. Salazar, 852 P.2d at 739-40.

With the implicit understanding that **ex post facto** analysis did not resolve the issue of whether state law otherwise prohibits the retroactive application of the life without parole sentencing option, the Oklahoma Court of Criminal Appeals undertook a review of state law retroactivity rules. The court found that Allen and Wade did not violate Oklahoma retroactivity guidelines but in fact ". . . are consistent with decades of Oklahoma law governing the application of procedural changes in criminal law." Salazar v. State, 852 P.2d at 737. In its discussion of the Oklahoma rules in criminal procedure the court analyzed numerous state cases, including the following: Ault v. State, 115 P. 128 (Okla. Crim. 1911); Winningham v. State, 488 P.2d 609 (Okla. Crim. App. 1971); Paul v. State, 483 P.2d 1176, 1178 (Okla. Crim. App. 1971); Bowman v. State, 789 P.2d 631 (Okla. Crim. App. 1990); Costa v. State, 753 P.2d 393 (Okla. Crim. App. 1988); Penn v. State, 164 P. 992 (Okla. Crim. 1917); Alberty v. State, 140 P. 1025 (Okla. Crim. 1914).[6] Id., 852 P.2d at 737-738. The court concluded its analysis stating:

> The dissent's argument that the procedural change in the Oklahoma death penalty statute does not apply to appellant's trial is simply unavailing, **unsupported by well-established Oklahoma law, and would result in a departure from precedent set by this Court.** Appellant's trial and conviction occurred after amended §§ 701.9 and 701.10 went into effect, and the life without parole provision was applicable law. The trial court should have provided the life without parole option to the jury, and the trial court erred when it failed to do so.

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[6] The court also considered the application of Article 5, § 54 of the Oklahoma constitution. **Id.** at 738.

Id., 852 P.2d at 739.

The court moved on to a discussion of the Eighth Amendment, but did not do so to provide a grounds for retroactive application of life without parole, but instead to highlight the gravity of the trial court's error and the need for resentencing to correct this error. Id., 852 P.2d at 739.

Then the court returned to state law, this time the statutory construction of the life without parole provisions.

In Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508 (1975), the Court stated:

> This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, see, e. g., Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948), and that we are bound by their constructions except in extreme circumstances not present here.

See also Schad v. Arizona, 501 U.S. ___, 111 S.Ct. 2491, 2499, 115 L.Ed.2d 555 (1991).

Although Petitioner and one member of the Oklahoma Court of Criminal Appeals may disagree, there is nothing extreme or unreasonable about the majority's construction of Section 701.10. First, the court noted that the wording of amended § 701.10 indicates that the triggering event for the application of the statute is the defendant's **conviction for murder**, as opposed to the commission of the murder. The court compared this language with the wording of another statute cited by the dissent in which the triggering event was the time of the **commission of the offense**. Salazar, 852 P.2d at 740.

The court then examined the provisions of Oklahoma's resentencing statute (21 O.S. Supp. 1989, § 701.10 (a)), which is applicable in cases where a conviction for capital murder

is affirmed on appeal but the sentence is reversed. Under that section the punishment is life, life without parole, and death, and the statute further states, "[t]he provisions of this section are procedural and **shall be applied retroactively**." (Emphasis Added) See Okla. Stat. Supp. 1987, tit. 21, § 701.10 (a) (5), supra. The court then recognized the anomalous situation which could arise if life without parole was to be given retroactive effect in the resentencing procedure but not in the normal capital sentencing procedures. If someone who was tried and convicted before the life without parole provisions went into effect had his/her sentence reversed for resentencing, he/she would be eligible for life without parole. However, an individual whose case was tried for the first time after life without parole came into effect, but whose crime was committed before life without parole, would be ineligible for life without parole, even though in both instances the crimes were committed before the life without parole statutes became effective.

The court then determined that the **results** of such disparate treatment could be a violation of due process and equal protection. However it reached this conclusion after it had already determined, through an analysis of the wording and operation of Oklahoma statutes, that life without parole should be given retroactive effect. It was the wording of the life without parole statutes and Oklahoma's resentencing statute, and the prior Oklahoma case law setting forth the retroactivity rules for procedural changes in Oklahoma criminal law, that caused the court to find that life without parole should be given retroactive effect in those situations wherein a defendant's alleged crime was committed before the effective date of life without parole but his trial came afterwards. While the citations to federal constitutional principals reinforce the court's finding and underscore the gravity of error

committed in this case, there is nothing in the Salazar opinion to indicate the Oklahoma Court of Criminal Appeals would be compelled to reverse its holding just because it was later determined that the prospective-only application of life without parole would not violate the Eight Amendment, Due Process, or Equal Protection. Unless the court also reversed itself on the state law retroactivity and statutory construction issues discussed above, the result of the case would be the same -- life without parole is applicable to all cases in which the trial occurs after the effective date of the statutes in question.[7]

C. **Because the decision in Humphrey was based upon determinations of state law independent of federal considerations, the State has failed to establish this Court's jurisdiction in the matter.**

This Court has held that it will not review a question of federal law decided by a state court if the opinion of the state court also rests on a state law ground that is independent of the federal grounds and adequate to support the judgment. The reason for this rule is the limitation of the Supreme Court's jurisdiction, which does not provide for purely advisory opinions. An opinion from the Supreme Court which would leave the lower court free to render the same judgment because of the existence of adequate state law grounds would be merely advisory. Michigan v. Long, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 3477, 77 L.Ed.2d 1201 (1983); Herb v. Pitcairn, 324 U.S. 117, 125, 65 S.Ct. 459, 463, 89 L.Ed.2d 789 (1945).

This Court can presume that there is no independent and adequate state law ground for a state court decision when the decision "fairly appears to rest primarily on federal law,

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[7] The two case that followed Salazar -- Hain v. State, supra.; and Humphrey v. State, supra., did not include the detailed analysis that went into the Salazar decision. However, the same Judge who wrote the opinions in Hain and Humphrey fully concurred in Salazar. Salazar is the leading case in Oklahoma on the LWOP issue.

or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 U.S. at 1040-1041, 103 S.Ct. at 3476-3477.

This presumption does **not** apply in cases where "it does **not** fairly appear that the state court rested its decision primarily on federal grounds, [and] it is simply **not true** that the 'most reasonable explanation' is that the state judgement rested on federal grounds. Cf. Long, supra, 463 U.S., at 1041, 103 S.Ct., at 3476-3477." (Emphasis Added) Coleman v. Thompson, 501 U.S. ___, 111 S.Ct. 2546, 2558, 115 L.Ed.2d 640 (1991). In such cases it is not necessary for the state court to explicitly state that its opinion is independently based upon state law grounds. In such cases, "It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgement. . . . We encourage state courts to express plainly . . . the grounds upon which its judgment rests, but we will not impose on state courts the responsibility for using particular language in every case . . . in order that federal courts might not be bothered with reviewing state law and the record in the case." Coleman, supra, 111 S.Ct. at 2559.

With its determination that its prior holdings in Allen and Wade were "consistent with decades of Oklahoma law governing the application of procedural changes in criminal cases," and with its finding that "The dissent's argument . . . is simply unavailing, unsupported by well-established Oklahoma law, and would result in departure from precedent set down by this court . . .", the majority of the Oklahoma Court of Criminal Appeals made clear, express statements that its holding on the life without parole issue was based on independent state

law grounds sufficient to support its decision regardless of the additional federal constitutional issues that the court chose to discuss. See Salazar, 852 P.2d at 737, 739. Even if these statements are not sufficiently clear in the minds of all readers, this Court should nevertheless deny certiorari because a review of the opinion in Salazar as a whole indicates that the court's decision was obviously supported on independent and adequate state law grounds.

The purpose of the Salazar opinion was to resolve state law questions concerning the construction of the Oklahoma statutes dealing with life without parole. The Oklahoma Court of Criminal Appeals had already decided in its previous holdings in Allen and Wade that life without parole should be given retroactive effect. However, the court's discussions of the law in those cases were unsatisfactory because they had not addressed state law issues.[8] The Petitioner, having lost the state law argument in Salazar, now wishes to renew that argument in this Court under the guise of federal constitutional analysis. This Court should further note that the Petitioner, although having sought certiorari in Hain[9] and in this case, pointedly did not seek certiorari in Salazar, and its Petition for Writ of Certiorari in this case makes practically no mention of the Court of Criminal Appeals' rationale in

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[8] That the Petitioner itself has focused on State law is further exemplified by the grounds that it chose to support its Petition for Rehearing in Allen v. State, supra. The Petitioner cited 22 O.S. 1981, § 3, which prohibits retroactive application of statutes codified under Title 22 of the Oklahoma Statutes. The Oklahoma Court of Criminal Appeals denied the Petitioner's application on the grounds that Section 3 of Title 22 was not applicable to the LWOP provisions which were codified under Title 21 (See 21 O.S. Supp. 1987, §§ 701.9 and 701.10). **Id.**, 821 P.2d at 377-378.

[9] The Petitioner's petition for certiorari in Hain v. State, 852 P.2d 744 (Okl.Cr. 1993), is currently before this Court in Case No. 93-1252.

Salazar. Through this strategy, Petitioner left this Court with only the limited discussions in Hain and in this case on which to ascertain the basis for Oklahoma Court of Criminal Appeals' decision. Petitioner is abusing its right to seek a writ of certiorari in this Court, and its petition should be denied.

II.

THE PETITIONER'S REASON III DOES NOT JUSTIFY CERTIORARI REVIEW BECAUSE PETITIONER, THE STATE OF OKLAHOMA, HAS NO STANDING TO RAISE AN EQUAL PROTECTION CLAIM ON BEHALF OF INDIVIDUAL CITIZENS WHO ARE NOT PARTY TO THIS LITIGATION.

In its third reason for granting certiorari, the Petitioner seeks to litigate the rights of a hypothetical class of individuals who may or may not have been deprived of equal protection of the laws by retroactive application of life without parole. This class consists of hypothetical defendants whose crimes were committed before the effective date the life without parole statutes, and who were denied retroactive application of life without parole because their trials were conducted shortly before the effective date of the provision. Petitioner argues that these persons were treated unfairly in relation to other defendants who were entitled to life without parole simply because their trials were put off until after the effective date of the sentencing provision, even though their crimes were likewise committed before the effective date of life without parole.

Regardless of the merits of such an argument, Petitioner, the State of Oklahoma, has no standing to raise it. Equal protection under the laws is a highly individualized right. "It is the individual . . . who is entitled to the equal protection of the laws, -- not merely a group

of individuals, or a body of persons according to their numbers." Mitchell v. United States, 313 U.S. 80, 97, 61 S.Ct. 873, 878, 85 L.Ed. 1201 (1941).

It has long been the law that the State is confined to representing its own interests and is not permitted to seek the jurisdiction of this court merely to vindicate the alleged wrongs visited on some of its people. State of Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 395, 58 S.Ct. 954, 958, 82 L.Ed. 1416 (1938).

Attempts to get around this prohibition are often times made in the context of individuals seeking to use the State to promote their private claims. See State of Oklahoma ex rel. Johnson, supra.; Commonwealth of Pa. v. National Ass'n of Flood Ins., 520 F.2d 11, 22 (3rd Cir. 1975); Philadelphia Hous. A. v. American Radiator & S. San. Corp., 309 F. Supp. 1057, 1061, 1064 (E. D. Penn. 1969).

Here, the State, having no legally recognized claim of its own, wishes to obtain relief from this Court by boot strapping its grievances upon the alleged rights of its citizens. This Court dealt with this situation in Pennsylvania v. New Jersey, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976). In that case Pennsylvania had a quarrel with New Jersey over a tax imposed on nonresidents working in New Jersey. Pennsylvania wanted to obtain the taxes collected by New Jersey under this tax, and to promote its claim it cited, among other things, the Privileges and Immunities Clause and the Equal Protection Clause. This Court disposed of these arguments by pointing out that "both Clauses protect people, not States", and, that "States may not invoke original jurisdiction of [the] Supreme Court to prosecute purely personal claims of their citizens." Id., at 665, 96 S.Ct. at 2335-2336. See also State of Maryland. v. Barry, 604 F.Supp. 495, 497-498 (D.C. 1985) (Maryland and Virginia could not

invoke the individual rights of their law enforcement officers as citizens, including their right to equal protection of the laws, to support an attack on the District of Columbia's emergency act limiting the activities of these officers in their capacity as state agents).

In this case the Petitioner has a problem in getting its foot in the door of the Court. When the Oklahoma Court of Criminal Appeals' decision in this case is put in proper context with the line of cases of which it is simply the latest, it is obvious the decision herein was based upon independent state law grounds, and accordingly there are no appropriate grounds for federal review. See arguments and citations addressed in Argument I, above. The Petitioner is attempting to get around this prohibition by boot strapping its claim upon the imaginary claims of a hypothetical class of Oklahoma citizens who are not parties to this case and who, as far as we can tell, do not physically exist. If there ever is a defendant who falls in the class on whose behalf the Petitioner makes its argument, that defendant will surely raise equal protection issues in this Court and that litigation will provide the appropriate forum and time for the resolution of those issues.

In the meantime, the only party to this case that has individual rights at stake is Mr. Humphrey, who is not contesting the holding of the Oklahoma Court of Criminal Appeals. Of course if Mr. Humphrey had lost this issue in his appeal he would have had a litigable and ripe equal protection claim -- that being that it was a denial of his right to equal protection of the laws for him to be deprived of life without parole just because his crime was committed before the effective date of life without parole, whereas others, whose crimes were also committed before the effective date of this sentencing scheme, would be eligible for life without parole if they obtained a resentencing on some other grounds. See 21 O.S.

Supp. 1989, § 701.10 (a). Petitioner entirely ignores this genuine equal protection issue which, but for the timely intervention of the Oklahoma Court of Criminal Appeals, would have impacted negatively on real defendants, including Mr. Humphrey. Yet now, out of supposed concern for the constitutional rights of future appellants against whom it will have obtained convictions for first degree murder and death sentences, the Petitioner urges this Court become embroiled in its quarrel with the Oklahoma Court of Criminal Appeals.

Toward the end of its petition the State of Oklahoma cites more potential problems which may arise under the Oklahoma Court of Criminal Appeals interpretation of life without parole. This includes the question of whether a defendant would be entitled to life without parole if his trial began before November 1, 1987, the effective date of life without parole, but did not end until after that date. Again, Petitioner cites no instance in which this has actually happened. If this situation ever arises, and a defendant is deprived of an instruction on life without parole, the Oklahoma Court of Criminal Appeals is quite competent to resolve this issue on appeal and should be given the chance to do so before having its powers preempted by any federal court. For this Court to take on this issue now would amount to an abrogation of the doctrine of comity under which the state court is given an opportunity to pass upon a matter before federal courts intervene. See Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982).

Petitioner also cites 1993 amendment to Oklahoma's capital resentencing statute (Okla. Stat. Supp. 1987, tit. 21, § 701.10 (a)), under which the punishment options are limited to those in effect at the time of the offense, and argues that even if Mr. Humphrey and those similarly situated do obtain resentencings, they will not be entitled to life without

parole upon resentencing. The Oklahoma Court of Criminal Appeals has decided this issue when it denied the State's petition for rehearing in Salazar, supra., 859 P.2d at 518-519.

The Oklahoma Court of Criminal Appeals ruled that the 1993 amendment to §701.10 (a) would not apply to Mr. Salazar because it would increase his punishment by denying him a sentencing option more lenient than death that was previously available to him. Accordingly, the retroactive application of the 1993 amendment would violate the constitutional prohibitions against ex post facto laws. Id., 859 P.2d at 518-519. Petitioner has not sought certiorari in this Court from this holding.

It follows that under Salazar, the 1993 amendment cannot apply to Mr. Humphrey or any defendant who is similarly situated, and therefore he, like Mr. Salazar, will be eligible for life without parole upon resentencing. Therefore the State's concern that such defendants will not be eligible for life without parole on resentencing is misplaced. A class of defendants who are eligible for a resentencing by operation of the state court holdings in Salazar and in this case, but who are not eligible for life without parole upon resentencing because of the 1993 amendment, is not only hypothetical; more fundamentally, such a class simply cannot exist under current Oklahoma law. If a defendant similarly situated to Mr. Salazar and Mr. Humphrey is deprived of the life without parole sentencing option at a resentencing and receives a death sentence, then the Oklahoma Court of Criminal Appeals can deal with this issue in that defendant's appeal. Again, the doctrine of comity mandates that the Oklahoma Court of Criminal Appeals be given an opportunity to pass upon this issue before the federal courts impose their will on Oklahoma. See Rose v. Lundy, supra.

CONCLUSION

The Court should deny the State of Oklahoma's Petition for a Writ of Certiorari because the opinion of the Oklahoma Court of Criminal Appeals holding that Respondent was entitled to a jury instruction on the sentencing option of life imprisonment without parole was based upon independent and adequate state law grounds, and because the State of Oklahoma has no standing to invoke the jurisdiction of this Court on behalf of the individual, constitutional rights of hypothetical defendants.

Respectfully submitted,

RANDY A. BAUMAN *
OKLAHOMA BAR ASSOC. NO. 610
DEPUTY APPELLATE INDIGENT DEFENDER
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3331

WILLIAM H. LUKER
OKLAHOMA BAR ASSOC. NO. 5562
DEPUTY APPELLATE INDIGENT DEFENDER
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3331

CINDY G. BROWN
OKLAHOMA BAR ASSOC. NO. 12583
ASSISTANT APPELLATE INDIGENT DEFENDER
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3331

ATTORNEYS FOR PETITIONER

* Denotes Counsel of Record